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DISSOLUBILITY OF HINDU MARRIAGE THROUGH CONVERSION TO ISLAM.

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Most of the writers on private international law and the conflict of laws treat at length the question of the laws and principles on which the dissolubility or non-dissolubility of marriage depends. According to international law the domicile of the married pair for the time being affords the only true test of jurisdiction to dissolve their marriage, *Le Mesurier* v. *Le Mesurier*[1] and *Bater* v. *Bater*[2]. As to the law applicable, that is neither the *lex loci contractus*, nor the *lex loci celebrationis*, nor the *lex loci delicti* but the *lex fori* that governs. In England, the latter is the law of the domicile of the parties at the time of the suit and not the *lex patriae* as in the continental countries of Europe. According to English jurisprudence, the contract of marriage does not include the conditions of its defeasance and the dissolubility or the indissolubility of the marriage depends on the domicile of the parties at the time of seeking relief, *Nachimson* v. *Nachimson*[3]. The reason for the rule is simple. The Christian conception of marriage is that it is a voluntary union between one man and one woman for life to the exclusion of all others, *Hyde* v. *Hyde*[4]. The statement was so made in 1866 but by that time, already in 1857, the Matrimonial Causes Act had been passed providing for the relief of divorce being granted under certain circumstances. The latter provision would be inconsistent with the Christian conception of marriage as it was set out. By way of reconciling the two positions, it came to be recognised that dissolution was not of the essence but only an incident of marriage and was therefore independent of the marriage contract. It could therefore be governed by a separate law. Also such law may well be different from the law which governed the parties at the time of their marriage, as for instance, where the parties had subsequent to the marriage changed their domicile. All these principles however rested on the conception of law as territorial. Obviously they cannot apply where the law governing the parties is "personal" attaching to them as followers of a particular religion like Hinduism or Islam. Where one of the parties to a marriage brings about a conflict of personal laws by forsaking their common religion and adopting another the question has often arisen whether the new personal law of the converted spouse can prevail over the old personal law retained by the unconverted partner under which the marriage had been celebrated, so as to bring about a dissolution of such marriage. The Bombay High Court gave a negative answer in *Robasa Khanum* v. *Khodadad Bomanji Irani*[5]. In Calcutta, till recently, there was a conflict of judicial opinion. Observations in In re *Ram Kumari*[6], *Mussamat Ayesha Bibi* v. *Subodh Chakravarty*[7], *John Jiban Chandra Datta* v. *Abinash Chandra Sen*[8], *Haripada Roy* v. *Krishna Benode Roy*[9], inclined to a line of thought in favour

1. (1895) A.C. 517, 540.
2. (1906) Prob. 209.
3. (1930) Prob. 217.
4. (1866) 1 P. & M. 130.
5. A.I.R. 1947 Bom. 272.
6. (1891) I.L.R. 18 Cal. 264.
7. (1945) 49 Cal.W.N. 439.
8. I.L.R. (1939) 2 Cal. 12.
9. A.I.R. 1939 Cal. 430.

of the dissolubility of the antecedent marriage by conversion of one of the spouses to Islam. The rulings in *Nur Jehan Begum* v. *Eugene Tiscenko*[1] and *Sayeda Khatoon* v. *Obediah*[2] contained a contrary suggestion. The observations in these decisions were all either by way of *obiter* or casual in character or made by single Judges only. The matter came therefore to be authoritatively reviewed by a Bench of the Calcutta High Court in *Rekaya Bibi* v. *Anil Kumar*[3]. It was there held that the observations in favour of the dissolubility of a Hindu marriage by one of the spouses subsequently becoming a Muslim were unsound and should be rejected. In that case, finding that she had been married to one who by reason of impotency could not consummate the marriage, the wife became a convert to Islam, offered that faith to her husband and on his failure to adopt the same, sued for a declaration that her marriage under the Hindu law stood dissolved. Alternatively, it was contended that her marriage should be declared to be a nullity by reason of the fact that her husband was impotent. In view of the decision of the Court in her favour on this point, the observations of the Judges on the effect of the conversion of the wife to Islam on the antecedent Hindu marriage are really *obiter* but they are entitled to high authority by reason of the Judges having elaborately gone into the matter and given a considered pronouncement. The learned Judges give three reasons for their conclusion that the conversion could not be used to dissolve the earlier Hindu marriage. They are : (*i*) the rules of Islamic law providing for the dissolution of the marriage on one of the spouses becoming a convert to Islam will have operation only where both the parties were subjects of an Islamic State and both of them went abroad and one of them embraced Islam while sojourning there and returned to the native land the other having chosen to continue in the foreign country itself; (*ii*) even if the rules of Islamic law providing for dissolution of the marriage were not subject to any such limitation, they could be invoked only in a case of *bona fide* conversion and not where the latter was a colourable transaction; and (*iii*) since matrimonial relief depends on the *lex fori* and inasmuch as in this case there is no law of domicile common to both parties, the rules of Islamic law can be applied at best only as principles of justice, equity and good conscience, but that in cases like the present the rules of Islamic law cannot be taken to be rules of justice and equity.

According to the Muslim law, conversion to Islam of a *Kitabia* does not dissolve his antecedent marriage with a woman belonging to his old creed. Thus if a Hebrew or a Christian husband adopted Islam but the wife continued in the old religion the marriage between the spouses will continue to remain lawful. If the parties were non-scripturalist, for instance, a Hindu, and one of them is converted to Islam in a country subject to the laws of Islam—Dar-ul-Islam—that religion should be offered to the other and if the latter accepts it the marriage will remain unaffected, otherwise the Judge should separate the couple. The Kazi must be moved to summon the other party to adopt the Moslem faith. In case of compliance the marriage remains valid *ab initio* and there will be no need for renewing the contract. In case of non-compliance the Kazi should dissolve the marriage and till he has done so the connection between the parties remains invalid and has all the consequence flowing from an invalid connection. If the conversion to Islam took place in a country where the laws of Islam are not in force—Dar-ul-hurb—the dissolution of the marriage is suspended until the wife has completed three of her terms (monthly courses) irrespective of whether cohabitation takes place or not. And on the completion of the terms the marriage is definitely dissolved. The reason is that in the latter case Islam cannot be formally presented for acceptance to the other spouse in a foreign country as the writ of the Kazi cannot run there. Where the parties are scripturalist and the wife becomes a Muslim the same procedure has to be followed, that is, if the conversion is in an Islamic country the faith must be offered for acceptance by the other spouse and on his refusal the marriage will be dissolved by the Kazi. But if the conversion of the wife was in a non-Islamic country and

1. A.I.R. 1941 Cal. 582.
2. (1945) 49 Cal.W.N. 745.
3. (1948) 52 Cal.W.N. 142.

the husband also adopts the faith before the expiry of three of her terms the marriage will continue to subsist, otherwise, they would become separated on such completion without the Kazi's intervention[1]. The foregoing enunciation makes it clear that the difference in procedure really turns on whether the conversion was in an Islamic or non-Islamic country. In the former case recourse to the Kazi is needed. In the latter case dissolution is automatic. But in both cases there must be a rejection of the faith, in the one case after summons and in the other by efflux of time without change of faith. In *Rakeya Bibi* v. *Anil Kumar*[2], explaining the scope of these provisions, Chakravarty, J., observed : " In our opinion, the rule is intended to apply only to a case where both parties to a marriage are subjects of an Islamic country, both go abroad, one of them embraces Islam in the foreign country and returns to his or her native land but the other remains in the foreign country. In such a case the Islamic law relieves one of its followers, *i.e.*, the convert of his or her marriage with an unbeliever, by providing for its automatic dissolution, because the Islamic State under the protection of which the convert lives and which has a responsibility towards him or her as one of its Muslim subjects, cannot act in *personam* against the other spouse and tender Islam to that person. This appears to us to be the true scope and meaning of the rule, and so understood it will be found to have a special reason behind it and to be a rule of possible practical effect. The Muslim lawgivers could not have assumed that a rule laid down by them as regards a matter between a Muslim and a non-Muslim would be accepted and applied in a foreign country to which the authority of no Islamic State extended, and, as is shown by the reason given for the rule they did not in fact so assume. They were legislating for persons subject to the Islamic law under the authority of an Islamic State." It may with respect be pointed out that at least one passage in the Hedaya is against the conclusion. That passage runs : " If the wife embraces the faith in a foreign country and her husband be an infidel, or if a *foreigner* there becomes a Mussalman and his wife be a Moosajea, the separation between them does not take place until the lapse of three terms of the wife's courses, when it becomes completely repudiated " (italics ours). It is clear the passage covers the conversion of a *harbi* also in a non-Islamic State. The infidel is the *zimmi*. The foreigner distinguished from him could therefore be a *harbi* only. In this view, the conclusion of the learned Judges as to the scope of the Islamic rule does not seem to be justified. The Judges themselves frankly acknowledge that there is no previous ruling lending support to their construction. The opinion of the Judges that, even assuming that the rule of Islamic law would apply where the parties were *harbis*, the rule cannot be invoked in the case before them as the conversion was not *bona fide* rests on firmer ground. Chakravarty, J., observed : " It seems to us to be elementary that if a conversion is not inspired by religious feeling and undergone for its own sake, but is resorted to merely with the object of creating a ground for some claim of right a Court of law cannot recognise it as a good basis for such a claim but must hold that no lawful foundation of the claim has been proved. . . . . . . A decree for dissolution of marriage or a decree that a marriage stands dissolved cannot, in our opinion, be obtained on the basis of a pretended conversion just as divorce cannot be obtained on the basis of pretended adultery or on the basis of acts deliberately done with the object of avoiding marriage." It may, as against this view, be urged that religion is a matter between a man and his maker, that a convert to Islam is a Moslem in fact whatever be the motive inspiring the conversion, and as such the prohibition imposed by that religion of marital intercourse between a Moslem and an infidel would operate. This no doubt has force, but overlooks the fact that where the conversion has been inspired not by a desire to gain an advantage for one self but with a view to prejudicially affect rights already accrued to another the law cannot countenance the latter object. To permit the latter will be to allow the practice of fraud upon the law. In *Skinner* v. *Skinner*[3], Lord Watson observed : " Whether

1. Ameer Ali, Mahommedan Law, 5th edition, Vol. 2, pp. 384-385.
2. (1948) 52 Cal.W.N. 142.
3. (1897) L.R. 25 I.A. 34 : I.L.R. 25 Cal. 537 (P.C.).

a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of divorce, is a question of importance and, it may be of nicety." The implication would at the highest be that if the change of faith is honest and both spouses consent thereto then the incidents of their marriage may be open to be affected. In *Skinner* v. *Orde*[1] the position seems to be more clearly expressed. In that case, the question was one relating to guardianship of the daughter by her mother. The parties were Christians. After the death of her husband, Mrs. Skinner the appellant was living with one John Thomas John. The latter was also a Christian having been married to a Christian wife who was alive and the marriage with whom was undissolved. Mrs. Skinner contended that she had become a Muslim and that John Thomas John had also become a Muslim and thereafter had married her according to Islamic rites. This argument was urged to show that by her living with John Thomas John she had not become unfit to continue as the guardian of her daughter. In repelling the contention, James, L.J., observed : "The house of the widow (Helen Skinner) became the house of one John Thomas John, a clerk of inferior grade in the Judge's Court, and they lived and cohabited together as husband and wife, John Thomas John being already the husband in Christian marriage of a living Christian wife. It is suggested that this union was sanctified and legalised in this way—that the widow became a Mohammedan, that John Thomas John became a Mohammedan, and that having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mohammedan form, a valid Mohammedan marriage with the widow, the appellant. The High Court expressed doubts about the legality of this marriage, which their Lordships think they were well warranted in entertaining.".

The last of the grounds relied on by the learned Judges in *Rakya Bibi's case*[2] was that even assuming that the rule of Islamic law would apply to cases of colourable conversion, still it cannot govern the case before them inasmuch a suit for matrimonial relief is governed by the law of domicile of the parties at the time the relief is sought and there was no such common law of the parties as they were governed on that date by different personal laws. Nor can the rule of Islamic law be applied as rules of justice and equity because according to the learned Judges equity and justice demanded the rejection of the applicability of the Islamic rule to the case before them. The conflict which really arises in cases like the present is a conflict between the common personal law of the parties at the date of the marriage and their different personal laws at the date of the suit. Had the law of the domicile been territorial no such conflict would have arisen. The present was a case where there were two different laws for the two parties. As to invoking the law of the convert as principles of justice, etc., it is to be remembered that it is not merely the wife that is to have freedom of religion and the privileges of the religion chosen by her. The husband also has a right to the same freedom and to tell him that he cannot retain his wife unless he forsakes his religion is to subject him to outrageous treatment. The converted spouse no doubt becomes entitled to the benefits of Islamic law but the unconverted spouse also becomes entitled to the benefits of the old law under which the marriage may not be dissoluble at all or at any rate not dissoluble on the conversion of one of the spouses to an alien faith. That the principles of Islamic law cannot be invoked as principles of justice, equity and good conscience was also the view adopted by the Bombay High Court in *Robasa Khanum* v. *Khodadad Bomanji Irani*[3]. In the latter case Blagden, J., went to the length of indicating that if the prior marriage was a monogamous marriage and one of the spouses had since the marriage become a convert to Islam and proposed to marry again under the Islamic law, the spouse retaining the original faith could apply in time and have the second marriage restrained by injunction and that in any event there would be a remedy in damages available to such person.

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1. (1871) 14 Moo.I.A. 309 (P.C.).
2. (1948) 52 Cal.W.N. 142.
3. A.I.R. 1947 Bom. 272.